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AZNUM ABDUL RAHMAN v. GHAZALI AHMAD & ANOR

HIGH COURT MALAYA, TAIPING
MUNIANDY KANNYAPPAN JC
[CIVIL APPEAL NO: AB-12B NCVC-15-08-2019]
29 JUNE 2021

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ROAD TRAFFIC: *Accident – Liability – Circumstances in which accident took place – Whether there was sufficient judicial appreciation of evidence – Whether findings of Sessions Court Judge lopsided – Whether liability ought to be apportioned on 50/50 percentage basis between driver of motorcar and motorcyclist – Claim for loss of dependency – Whether victims gainfully employed and contributed to respective families – Whether there was documentary evidence – Evidence Act 1950, ss. 32(1), 56, 60(3), 114, 118 & 167*

C

TORT: *Road accident – Damages – Claim for – Claim for loss of dependency – Whether victims gainfully employed and contributed to respective families – Whether there was documentary proof – Assessment of compensation – Claim for bereavement and funeral expenses – Whether allowed – Evidence Act 1950, ss. 32(1), 56, 60(3), 114, 118 & 167 – Civil Law Act 1956*

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This was an accident case involving a car and a motorcycle. Both motorcyclist and pillion rider, aged slightly over 18 years ('first and second victims') were killed in the accident. The first and second plaintiff were the father of the first and second victims respectively. The defendant was the driver of the said car. According to the defendant, she was negotiating the slightly winding uphill country road when a motorcycle suddenly strayed onto her way and collided with her car. The defendant claimed she had seen the motorcycle in front of her but when it was about 5 metres away, it was too close for her to do anything to prevent the accident. The police investigating officer ('IO') of the case testified that the road was narrow and there was no road shoulder on the left side of the road. There were no witnesses to the accident, save for the driver of the car. The case was classified as 'No Further Action' ('NFA') or 'Refer to Magistrate' ('RTM'). The Sessions Court held, *inter alia* (i) the first victim was totally responsible for the accident and was 100% at fault for causing the death of the second victim; (ii) there was no liability on the part of the defendant; (iii) the plaintiffs' claim for loss of dependency was disallowed; (iv) bereavement claim of RM10,000 and funeral expenses of RM3,000 were allowed for the plaintiffs; and (v) a total sum of RM26,000 was allowed as compensation to be paid to the plaintiffs. The plaintiffs appealed to this court against the said decision. The defendant too appealed on quantum of damages allowed, in respect of claim for bereavement and funeral expenses.

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Held (allowing plaintiffs' claim; liability apportioned on 50/50 percentage basis):

(1) SP5, who worked as a manager at Chandro Agro, told the court that the first victim had worked at the said company by providing the offer letter ('ID28') as well as the acceptance letter ('ID29') for the post offered to her. These letters which were produced in court carried the signature of the owner of Chandra Agro. Additionally, salary vouchers for the time period from March 2017 till February 2018 of the first victim were also produced in court. The existence and production of ID29 fell neatly within s. 32(1)(b) of the Evidence Act 1950 ('EA'). The acceptance letter was a document signed by the deceased first victim after having received the offer of employment from SD1. The salary vouchers, on the other hand, was an acknowledgement of salary or monies received by her. Hence, *albeit* the said documents were tendered in court by SP5, it was admissible under s. 32(1)(b) of the EA. Thus, although the maker of the said document was not called to tender the same in court, rendering it to remain only as identification exhibit was preposterous as full force of the EA came into operation in those circumstances. Moreover, the said document was produced in court by SP5 pursuant to her oral evidence which referred to the existence of the said document as real evidence by virtue of s. 60(3) of the EA. Both the offer letter and salary vouchers were prepared by her for the benefit of the deceased first victim. (paras 16 & 18)

(2) The circumstantial evidence was borne out by the testimony of SP5 in her capacity as the manager of Chandra Agro in which the first victim had worked. Logically her testimony was premised on the record available at her organisation. Although SD1 had denied issuing her an authorisation letter (ID25) to appear in court and testify, but in law she was a competent witness pursuant to s. 118 of the EA. In that context, on a balance of probabilities, the first plaintiff had been successful in proving to the court during trial, that the said documents existed, which had in fact fortified proof that the first victim was gainfully employed by her employer and earning a salary. SD1 had also admitted that it was his signature on the letter of offer (ID28) issued to the deceased first victim. The salary vouchers were a follow on from the acceptance letter by the first victim. It was also evidence of payment of salaries to her which was in fact corroborated by the testimony of her father, the first plaintiff that she brought monies to him. She had in fact contributed financially to the first plaintiff, her dependent. In the premise, although the document was only put in for identification purpose only, it deserved its due weight under the EA, as proof by the first plaintiff. It was best evidence in that instance, proffered by the first plaintiff to buttress his case against the defendant. The first plaintiff could not be

left helpless under the law when proving his case, since SD1 testified on behalf of the defendant. But fairness and justness of the law allowed the first plaintiff to take advantage of the circumstances in which the said letters and salary vouchers were issued to the first victim when she was alive and gainfully employed. (para 20)

(3) SP4 who owned Tazzuwa Enterprise where the second victim worked, was engaged in a myriad of jobs, ranging from workshop to providing cleaning services. He shored up his testimony to say that she worked for him and in support had produced an offer letter of employment (P20), letter of acceptance by the deceased second victim (ID21), salary vouchers (ID22) of the said victim in court as real evidence for the time period from June 2017 until February 2018. Once again, existence and production of the salary vouchers were allowed under the law pursuant to s. 60(3) of the EA. It in fact amounted to real evidence. Premised on the same provision, the said salary vouchers ought to have been marked as exh. P22. Furthermore, as the second victim was deceased, s. 32(1)(b) of the EA was triggered, wherein the salary vouchers were an acknowledgement of salary or monies received by her. (para 24)

(4) It was apparent from the uncontroverted testimony of the dependent plaintiffs that the victims had provided and contributed monies for them. Section 114 of the EA comes to their aid, which provides for the discretion of the court to invoke presumptions that are general in nature. Provision and contribution of monies by the victims to their parents, respectively the first and second plaintiff, strongly indicated they were in fact earning. In relation to the testimony of the first and second plaintiffs, there were in fact contributions by the victims from their earnings to their families and both the first and second plaintiffs were dependants of their gainful employment and activity. Hence, in all probability, the plaintiffs were telling the truth about the monies earned by the victims and how it was spent. They are simple folks and the way monies were spent fits into a rural family set-up. Moreover, contribution of monies by children to the family was very much expected in such family units. (para 32)

(5) The Sessions Court Judge ('SCJ') ought to have been more vigilant when allowing or disallowing the documents tendered as either identification or admissible evidence appropriately. Task of counsel is to assist the court responsibly. There is no avenue under the law of evidence for the documents to be marked for identification purpose only when it should be marked as an admissible piece of evidence. The law has to cater for both sides of the adversary and not specifically to one side, like for the defendant in this case. What was paramount was the evidence adduced and marking of exhibits was dependent on the evidence adduced to support the production and admissibility of those exhibits as proof and not anything else. (para 21)

(6) The years of purchase for those who died before thirty years old pursuant to the Civil Law Act 1956 ('CLA') is 16 years of purchase. Therefore, compensation for the first victim would be RM500 x 16 years, which came up to RM96,000.00. Funeral expenses of RM3,000 was also allowed. As for the second victim, premised on liability *vis a vis* defendant and the first victim, the sum awarded would be RM600 x 16 years, adding up to RM115,200. Funeral expenses of RM3,000 was allowed too. As Muslims, the funeral expenditure would come under *khairat* which did not require proof of expenditure. However, judicial notice could be taken of such expenses which was necessarily incurred with the passing on of both the victims, pursuant to s. 56 of the EA. Under s. 56 of the EA, the court may also take judicial notice of matters which were of common and general knowledge. This would include a situation in the present case that both victims who were Muslims had passed on due to the accident and definitely there would have been a Muslim funeral for which their respective families, with the first and second plaintiffs as dependants, incurred expenses to bear the funeral expenses. The claim for funeral expenses was thus allowed pursuant to s. 7(3)(ii) of the CLA. However, as the victims were already above eighteen years old at the time of the accident, they had attained the age of majority and thus was disentitled to the bereavement claim (s. 7 (3B) of the CLA. (paras 34-36)

(7) The SCJ had palpably missed the advantage of appreciating judicially the audible and documentary evidence proffered in the case. Appellate intervention was justified for the following reasons (i) there had been insufficient judicial appreciation of the evidence as to the circumstances in which the accident had taken place; (ii) the findings made by the SCJ was lop-sided, as he chose to only accord preponderance to the evidence of the defendant who was able to testify as to how the accident had taken place. It was most unfortunate that the victims of the accident, the children of the first and second dependant plaintiff were deceased, thus their testimony was absent. The SCJ ought to have been more mindful as to how the accident may have happened and foremost in his mind has to be the probabilities of the case by which the accident could have taken place; (iii) the fact that the defendant was unable to see the motorcycle approaching until it came so close to her was in fact a deciding factor demonstrating that on a balance of probability, the defendant would have in fact been unable to have avoided the accident; (iv) all these factors were not accorded ample consideration it deserved by the SCJ before arriving at a finding of fact on the manner by which the accident had taken place and who was blameworthy appropriately; (v) the SCJ was in a haste to conclude that both dependants of the victims who were plaintiffs to the civil action were lying about the gainful employment and activity of the victims and income earned by them. The SCJ had

improperly rejected the evidence of the plaintiffs proffered *vide* documentary proof. Pursuant to s. 167 of the EA, if the rejected evidence was received, appellate intervention was well justified, as had happened in the present case. In view of the foregoing, the decision of the SCJ was reversed and the plaintiffs' claim against the defendant was allowed. Liability was to be apportioned on a 50/50 percentage basis, *to wit*, both the deceased first victim and the defendant were to be blamed equally for the accident. The second victim being the pillion rider was an innocent passenger and in law was not liable at all but could claim from the other tortfeasor, the defendant. (paras 9, 38 & 39)

Case(s) referred to:

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Jayakumar Kuppusamy & Anor v. Chen Kit Hong & Anor [1983] 1 LNS 59 HC ***(refd)***
Pang Ah Chee (M.W.) v. Chong Kwee Sang [1985] 2 CLJ 221; [1985] CLJ (Rep) 236 FC ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
SS Hontestroom v. SS Sagaporack (1927) AC 37 ***(refd)***
The Motor Emporium v. Arumugam [1933] 1 LNS 106 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(ii), (3B), 12(4)
Evidence Act 1950, ss. 32(1)(b), 56, 60(1), (3), 101, 102, 114, 118, 136(1), (2), (3), 167
Rules of Court 2012, O. 18 rr. 3(2), 14(1), (3)

For the appellant - Subramaniyan Nambiar; M/s Subramaniyan
For the respondents - Hema Malini Kolandasamy; M/s K Suganthi & Co

[Editor's note: Appeal from Sessions Court; Suit No: AB-A53 KJ-157-10-2018.]

Reported by Suhainah Wahiduddin

JUDGMENT

Muniandy Kannyappan JC:

Background Facts

[1] It was an accident case involving a car (HR-V) bearing registration No. AHS 6868 and motorcycle bearing registration No. AKP 1647. Both motorcyclist and pillion rider were killed in the accident which occurred on 2 March 2018 at around 5.50pm at 10th mile, Jalan Kerian, Semanggol. Both were females aged slightly over 18 years.

[2] The car was driven by a lady bank officer on her way home to Kamunting from her workplace in Parit Buntar. As she was negotiating the slightly winding uphill country road, she claimed a motorcycle suddenly strayed onto her way and collided with her car. According to her, the weather was clear at that time and visibility was good. She said that she saw the motorcycle in front of her when it was about five metres away, too close for her to do anything to prevent the accident.

[3] In the course of this judgment, the driver of the motorcar is referred to as defendant and both deceased motorcyclist and pillion rider as first and second victim. The first and second plaintiff in this case are the father of the first and second victim respectively.

Evidence

[4] The defendant explained that she could not react in any way to avert the accident as the motorcycle appeared before her without any warning. She said this when it was put to her that she could have averted the accident by swerving to the right as there was no oncoming vehicle at the time of collision.

[5] The police investigating officer (IO) of the case testified in court that the area was prone to accidents, but there had been no fatal one. He continued to say that the road was narrow and there was no road shoulder on the left side of the road. There were no witnesses to the accident, save for driver of the car. Case was classified as "no further action" (NFA) or "refer to Magistrate" (RTM). In his own assessment, he testified that the accident was probably caused by the motorcyclist.

[6] The HR-V was traveling at a speed of 50-60 km/h and it was going up a slight gradient. The motorcyclist, on the other hand, was negotiating a bend and heading downhill, suggesting that she would have been moving rather fast. This may to a certain extent, point out that the collision occurred on the driver's path, hitting the front, right side of the HR-V.

[7] Coupled with the above narration, the ill-fated motorcyclist and parts of the motorcycle wreckage were found on the path of the HR-V. The car was damaged on the front, right side. All these physical evidence do converge to point out that the motorcyclist had veered into the driver of the car's right of way.

At The Sessions Court, Taiping

[8] The case was first heard at the Sessions Court, Taiping where the first plaintiff Ghazali bin Ahmad, father of Nur Aimi Zahirah (the motorcyclist) and second plaintiff, Abdul Wahab bin Salleh, father of Nurul Izzati (pillion rider) had testified. In all, five witnesses were called to support case of the plaintiff, while the defendant had called three witnesses. At the end of trial, the court decided on the following points on 19 July 2019:

(i) Nur Aimi Zahirah, the motorcyclist was totally responsible for the accident.

(ii) She was 100% at fault for causing death of Nurul Izzati Abdul Wahab, the pillion rider.

(iii) There was no liability on the part of driver of the car, the defendant.

(iv) The plaintiffs' claim for loss of dependency was disallowed.

(v) Bereavement claim of RM10,000 was allowed for both plaintiffs.

(vii) Funeral expenses of RM3,000 was allowed for the plaintiffs.

(viii) Thus a total sum of RM26,000 was allowed as compensation to be paid to the plaintiffs.

(ix) Interest and costs of RM4,820 was allowed.

This Appeal And Arguments Advanced

[9] The plaintiffs appealed to this court against the said decision. The defendant too had appealed on quantum of damages allowed, in respect of claim for bereavement and funeral expenses as well as on the decision made by the Sessions Court Judge (SCJ) that special damages allowed is not subject to liability. After hearing arguments by both counsel for plaintiffs and defendant, this court had reversed the decision of SCJ and found that liability is to be apportioned on a 50/50 percentage basis, *to wit*, both the deceased first victim, the motorcyclist and defendant are to be blamed equally for the accident. The second victim, being pillion rider was an innocent passenger and in law not liable at all but could claim from the other tortfeasor, who is driver of the motor car, the defendant. (See *inter alia* the case of *Jayakumar Kuppusamy & Anor v. Chen Kit Hong & Anor* [1983] 1 LNS 59; [1984] 1 MLJ 376). His Lordship Mohamed Dzaiddin J (as he then was, later Chief Justice) after having referred to *Halsbury's Laws of England* had decided:

> where a person travelling as a passenger in a vehicle belonging to a third person is injured by the negligence of the defendant, he is entitled to recover in full against the latter notwithstanding that the driver of the vehicle in which the plaintiff is travelling may also have been guilty of some negligence contributing to the accident.
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> As far as I am aware, this common law principle is still good law.

[10] Basis of decision by this court is:

(i) The SCJ erred on the body of evidence available which goes to show that the defendant is equally liable for the accident.

(ii) On a balance of probabilities, the SCJ ought to have found the defendant liable for the accident as she had not taken evasive action to prevent the accident.

(iii) The stark fact that the defendant saw the motorcyclist approaching in front of her at the material time ought to have tilted the balance in favour of the motorcyclist.

(iv) The SCJ had afforded undue weight to the fact that the point of impact at the front part of the defendant's motorcar must show that the rider of motorcycle was at fault without considering the fact that the defendant

too is equally at fault and blameworthy when she saw the motorcyclist approaching and she could have taken evasive action to avert the accident.

Thus, both the motorcyclist and defendant are equally negligent and blameworthy for the accident.

[11] The decision on liability was handed down on 10 July 2020. The issue on quantum was to be decided on a later date after hearing further submission by counsel for plaintiffs and defendant.

[12] During submission on quantum, matter became denser when counsel for defendant argued that the SCJ had erred when an amount of RM10,000 was allowed as claim for bereavement for each of the plaintiff, RM3,000 as funeral expenses for each of them and compensation was ordered not subject to liability.

[13] It was submitted that award of quantum is always subject to liability as rendered by s. 12(4) of the Civil Law Act 1956 (Act 67). Further, it was contended that as liability is now apportioned, then counter-claim and set-off raised by the defendant takes effect. The counterclaim and set-off relate to contribution and/or indemnity for the second plaintiff from the first plaintiff. It is highlighted that plaintiffs did not file any defence to the said counter-claim and set off pursuant to O. 18 r. 3(2) of the Rules of Court 2012 (ROC). In such a situation, O. 18 r. 14(1) and (3) ROC applies which renders that:

(1) If there is no reply to a defence, there is an implied joinder of issue on that defence.

(2) ...

(3) There can be no joinder of issue, implied or express, on a statement of claim or counterclaim.

[14] Nonetheless, two issues which mainstay in this appeal are on the loss of dependency allowed and costs of bereavement which was not allowed by this court.

Gainful Employment Of The Victims And Claim For Loss Of Dependency

[15] Counsel for plaintiffs had forcefully argued that the motorcyclist and pillion rider who were victims of the accident were gainfully employed at the time of accident. They had left behind their respective parents. The parents are pursuing a dependency claim on their behalf, claiming loss of dependency. The motorcyclist Nur Aimi Zahirah, first victim now deceased, was working as a clerk for a concern named and styled as Chandra Agro, earning a salary of RM1,250 per month, while second victim, the pillion rider was working at Tazzuwa Enterprise, also as a clerk and earning a salary of RM1,400 a month.

[16] To support their claim, during trial at the Sessions Court, SP5 and SP4 were called as witnesses to testify. SP5 who worked as a manager at Chandra Agro told the court Nur Aimi Zahirah worked at Chandra Agro by providing the offer letter (see ID28 later P28) as well as acceptance letter (see ID29) for the post offered to her. These letters which were produced in court carried signature of the owner of Chandra Agro, SD1. Additionally, salary vouchers for time period from March 2017 till February 2018 of the first victim were also produced in court and marked as P30 (earlier ID30). The acceptance letter remained as an identification exhibit. The evidential issue that follows is on the weight of the identification documents as proof of plaintiffs' case in court.

[17] Production of the said letters and vouchers by SP5 was confronted with refute, wherein the authenticity of signatures on the documents was challenged. On the evidential issue raised, pursuant to the leading case authority of *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180 at p. 183, which was later confirmed by the Federal Court, it was decided:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973-74 and 1972 respectively. **As this two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto** ...
>
> (emphasis added)

This rule of evidence is equally applicable to a civil trial (like the present case) as it involves the application of the Evidence Act 1950 (Act 56; EA) which caters for both criminal and civil trial.

[18] However, what is apparent is that marking of the acceptance letter as ID29 is flawed. It remained as identification exhibit as the rule of evidence that author of the document who is the first victim is deceased and could not testify for the plaintiffs, has not been complied with. However, it has to be noted that existence and production of ID29 would neatly fall within s. 32(1)(b) EA. The acceptance letter is a document signed by the deceased first victim after having received the offer of employment from SD1. The salary voucher on the other hand was an acknowledgement of salary or monies received by her. Hence, *albeit* the said documents were tendered in court by SP5, it was admissible under s. 32(1)(b) EA. Thus, although maker of the said document was not called to tender the same in court, rendering it to remain only as identification exhibit is preposterous as full force of the

Evidence Act 1950 comes into operation in those circumstances. Moreover, the said document was produced in court by SP5 pursuant to her oral evidence which refers to the existence of the said document as real evidence by virtue of s. 60(3) EA. Both the offer letter and salary vouchers were prepared by her for the benefit of the deceased first victim.

[19] The SCJ too had in fact erred on the facts and law, when he did not take into consideration the evidential point that proof of documentary evidence, like the offer and acceptance letter and salary vouchers in the present case, could also be by way of circumstantial evidence. Support can be had from the decision of the Federal Court in the case of *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 at p. 116; [1983] 2 MLJ 32 at p. 277 (CLJ) where it was decided by Abdoolcader FJ (as he then was) the following:

> The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it (*Baru Ram v. Prasant*) and a document can also be regarded as evidence by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. **The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence** ...
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> (emphasis added)

Although the case refers to a criminal matter, but the rule of evidence established by the case is of universal application, to a criminal or civil case.

[20] Easing back to the rule of evidence established, the circumstantial evidence in this case is borne out by testimony of SP5 in her capacity as the manager of Chandra Agro in which the first victim had worked. Logically her testimony is premised on the record available at her organisation. Chandra Agro is a lawful business concern registered with the Companies Commission of Malaysia evidenced by P26 and P27 and has been in operation since 15 December 2016. Although SD1 had denied issuing her an authorisation letter (ID25) to appear in court and testify, but in law she is a competent witness pursuant to s. 118 EA. In that context, on a balance of probabilities, the first plaintiff had been successful in proving to the court during trial, that the said documents existed, which had in fact fortified proof that the first victim was gainfully employed by her employer and earning a salary. SD1 has also admitted that it was his signature on the letter of offer (ID28 later P28) issued to the deceased first victim. The salary vouchers are a follow on from the acceptance letter by the first victim. It is also evidence of payment of salaries to her which is in fact corroborated by the testimony of her father, the first plaintiff that she brings monies to him. She had in fact

A contributed financially to the first plaintiff, her dependent. In the premise, although the document is only put in for identification purpose only, it deserves its due weight under the EA, as proof by the first plaintiff. It is best evidence in that instance, proffered by the first plaintiff to buttress his case against the defendant. The first plaintiff cannot be left helpless under the law
B when proving his case, since SD1 testified on behalf of the defendant. But fairness and justness of the law allows the first plaintiff to take advantage of the circumstances in which the said letters and salary vouchers were issued to the first victim when she was alive and gainfully employed.

[21] There was unfounded objection raised by counsel for defendant raised
C when documents ID28, ID29 and ID30 were marked. Objection raised was that it has to be marked as an identification exhibit subject to cross-examination and/or submission, which was unfortunately agreed to by the SCJ. During examination in chief (EIC) of SP5, the matter ought to be resolved as on completion of EIC, the matter on marking of exhibit ceases
D for case of the plaintiff, unless the matter is revisited on application by parties or court at a later stage. This would be consonant with s. 136(1), (2) and (3) EA, which renders the following:

> Court to decide as to admissibility of evidence
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> E 136 (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the court shall admit the evidence if thinks that the fact, if proved, would be relevant, and not otherwise.
>
> F (2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.
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> G (3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.
>
> ILLUSTRATIONS
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> H (a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.
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> The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

I In this case, there were many instances where counsel for defendant had objected to the marking of documents as exhibits when there are provisions in the Evidence Act that allows for its production as admissible evidence in

view of the fact that the victims are deceased at point of trial. The SCJ ought to have been more vigilant when allowing or disallowing the documents tendered as either identification or admissible evidence appropriately. Task of counsel is to assist the court responsibly. There is no avenue under the law of evidence for the documents to be marked for identification purpose only when it should be marked as an admissible piece of evidence. The law has to cater for both sides of the adversary and not specifically to one side, like for the defendant in this case. What has to be paramount is the evidence adduced and marking of exhibits is dependent on the evidence adduced to support the production and admissibility of those exhibits as proof and not anything else. It is so strange in this case that documents like ID28 and ID30 were remarked after SD1 testified, on the basis that he could not deny authorship of those documents, as his signature was found on it. The same piece of evidence was adduced and alluded to by SP5 when she testified on behalf of the first plaintiff and yet the SCJ at the behest of counsel for defendant, had agreed to mark it as admissible evidence much later subject to cross-examination and after hearing submission on admissibility of those documents. It is explicit under the law pursuant to s. 136(1) EA, the trial court should mark the documents as either identification exhibit or admissible evidence promptly on its production, unless an instance under s. 136(2) EA arises where admissibility of the document is subject to other evidence which was not forthcoming then. Even then, it has to be resolved at the stage of case at which the party intends to produce and admit those documents (like the plaintiff in the present case) and not to await presence of the defendant witness SD1, simply because the case of plaintiff and defendant is so well truncated that case of the defendant would only follow after completion of plaintiff's case and not before that. That would be the reason why there is an avenue under the law for submission of no case to answer by the defendant, who may elect not to adduce evidence at his own peril if a position is taken that the plaintiff has not been successful in proving its case against defendant on a balance of probabilities.

[22] Although SD1, Mr Chandra had testified that he did not hire SP5 nor the first victim, and stated that he did not authorise SP5 by issuing ID25 for her to appear in court to testify on behalf of Chandra Agro, the sworn testimony of SP5 remains that she had in fact worked for him at the material time. She was cross-examined at length, from which she came out unscathed and her testimony remains unrefuted. As alluded to earlier, she is also a competent witness for and on behalf of first plaintiff.

[23] It became murkier when it was alleged that SD1 set up Chandra Agro to hire foreigners, thus the first victim was never employed by him. As to the reason why SD1 had not cooperated with the first plaintiff with regard to his evidence on gainful employment of the deceased first victim, is irrelevant. The trial court has to premise its finding on facts and law based

A on hard and tangible evidence available as proof. It would be that evidence in sum total to be considered by the court in order to arrive at an informed decision that the deceased victim was in fact gainfully employed before the fatal accident and she had in fact contributed financially to her dependent, the first plaintiff. Whatever arrangement or collusion SD1 may have had
B with other individuals in order to thwart the claim by the first plaintiff for loss of dependency is irrelevant and inadmissible under the EA. Metaphorically, wood cannot be missed for the trees.

[24] Likewise, on a similar vein, the documentary evidence proffered by the second plaintiff to support the gainful activity by the second victim was
C also rejected as admissible evidence. (See ID21 and ID22). Moving on, SP4 who owns Tazzuwa Enterprise where Nurul Izzati the second victim worked, was engaged in a myriad of jobs, ranging from workshop to providing cleaning services. He shored up his testimony to say that she worked for him and in support had produced offer letter of employment
D (P20), letter of acceptance by the deceased second victim (ID21), salary vouchers (ID22) of the said victim in court as real evidence for time period from June 2017 until February 2018. Once again, existence and production of the salary vouchers is allowed under the law pursuant to s. 60(3) EA. It in fact amounts to real evidence. Premised on the same provision, the said
E salary vouchers ought to have been marked as exh. P22. Furthermore, as the second victim is deceased, s. 32(1)(b) EA is triggered, wherein the salary vouchers are an acknowledgement of salary or monies received by her.

[25] On the documentary proof proffered by both the first and second plaintiffs on loss of dependency, finding was made by the SCJ stating the
F following:

> Dokumen-dokumen surat tawaran pekerjaan kedua-dua simati, surat penerimaan pekerjaan oleh kedua-dua simati, slip gaji kedua-dua simati dan surat kuasa kebenaran Zaidah bin Yahya (*sic*) memberikan keterangan masih ditandakan sebagai ID setelah pihak Plaintif-Plaintif gagal
G membuktikan keesahan dan ketulenan dokumen-dokumen tersebut dalam perbicaraan. Mahkamah mendapati atas keraguan dan percanggahan keterangan saksi-saksi perbicaraan di pihak Plaintif-Plaintif, adalah meragukan dan lebih cenderung berlakunya penipuan keterangan dan dokumen palsu oleh saksi-saksi Plaintif-Plaintif dengan memfailkan tuntutan palsu dan tidak benar oleh Plaintif-Plaintif dalam tuntutan ini ...

H In view of the arguments alluded to above and effect of the full force of applicability of salient provisions of the EA, the finding made by SCJ on the admissibility and effect of documentary proof tendered by the plaintiffs, is flawed and it does not sync with the rules of evidence contained in the EA. Furthermore, some of the documents referred to by the SCJ in his finding
I as identification exhibits, had already been marked as admissible evidence, thus reference to it as such is misplaced and conflicting.

[26] In an attempt to contradict SP4's evidence, counsel for defendant had advanced her case by stating he did not pay income tax nor made EPF contribution for Nurul Izzati, suggesting illegal employment. That is a matter to be taken up by the respective authorities against SP4 and it does not concern the second plaintiff or second victim if she is still alive. Such a proposition only goes to show that the defendant is all out to negate any form of claim resulting from livelihood of the second victim of the accident with the sole purpose of thwarting her father's claim as second plaintiff for loss of dependency.

[27] In this rumpus of employability of the victims, SD3, Katar Singh, an insurance adjuster, told the court that the first plaintiff had informed him that his daughter, Nur Aimi Zahirah was only working at a food stall. He also went on to say that the second plaintiff, father of the second victim, had also told him that he did not know if his daughter, Nurul Izzati was working. It has to be borne in mind that both first and second plaintiff had testified on each of their daughters' gainful employment respectively. They were cross-examined at length and they came out unscathed. In the wake of their uncontroverted testimony, the evidence proffered through SD3 ought to be given less weight. This is so because the testimony of the plaintiffs fits in well with s. 60(1) EA as they had lived with the accident victims during their life time as opposed to SD3's testimony who appeared much later in the episode, with the sole purpose of attempting to demonstrate to the court that the victims were not gainfully employed at the time of accident in order to thwart the claim for loss of dependency by plaintiffs.

[28] On the quality of his evidence in court, counsel for plaintiffs contended that SD3 was not a credible witness, thus his testimony is unreliable as it was not supported by substantial evidence of the alleged meetings with the plaintiffs. Some photographs were tendered but dates on the said photographs were unclear. Moreover, SD3's source of information is from other third parties, which was repeated in court, rendering it to be inadmissible hearsay not in sync with s. 60(1) EA.

[29] Issue as to loss of dependency and employability was then pursued when the first plaintiff recounted that his daughter, Nur Aimi Azirah gave him RM500 each month. Out of this amount, RM300 goes towards payment of instalment for her motorcycle, whilst the balance, is set for household expenses, inclusive.

[30] The second victim, Nurul Izzati had contributed RM600 every month to her father the second plaintiff. He had then utilised the said monies to purchase necessities for home and in case of balance left it would be spent for the family including her sister.

[31] This issue struck a discord with both counsel for plaintiffs and defendant. Contention by counsel for defendant is that the victims were not working, hence there was no loss of dependency, *ab initio*. Further, it was confidently argued that their case of loss of dependency is not in fact a loss when the monies provided was used beyond needs of the dependents. It was stated further that monies contributed by the victims was not solely for use by the plaintiffs. The argument advanced was not supported by any authorities be it in the form of case law or legislation. What she had attempted to do was to merely say there was such and such a case she had argued at the High Court and Court of Appeal without condescending to exact particulars. She had even resorted to quote names of judges before whom she had argued on a similar point and apparently agreed upon by the said judges. This had attracted chagrin from counsel for plaintiffs. Although feeble undertaking was given by counsel for defendant that the said authorities would be made available to the court and opposing counsel, but till the time of this judgment none was supplied. In any event, reference to past precedents may not augur well as facts of the present case and that decided would be saliently different. Case authorities evolve with the passage of time and it ought to be analysed and understood in that perspective and nothing more. But common law evolves with time and new grounds can emerge at the time when a decision is made. The decision made has to suit the facts and circumstances of the case at hand. In that regard, counsel's reference to past authorities seemingly agreed upon by the judge before whom she has argued is a tenuous submission which lacks focus and justification. On this issue, cue shall be taken from the judgment of VK Rajah JC (as he then was) in the case of *Cheong Ghim Fah & Another v. Murugan Rengasamy* (2004) SGHC 19, (incidentally also an accident matter) where on the issue as to use of precedents, he had this to say:

> ...
>
> Use of precedents
>
> 46. There is perhaps one other issue that should be addressed before dealing with the merits – the use of precedents in essentially factual disputes.
>
> 47. Counsel often expend considerable energy and ingenuity in moulding their factual submissions to fit the shape and tenor of a precedent which purportedly supports their case theory. This is not constructive. Precedents are valuable to the extent that they illustrate principle. Statements of fact and expressions of opinion contained in many factual precedents ought to be viewed with circumspection, particularly in factual cases like negligence proceedings (**like the present case**). Often the unarticulated premises of these statements and opinions are difficult to divine. The factual context is often incomplete. Moreover, it would be highly unusual for two factual situations taking place at different times and/or

locations to be identical in every respect. Facts may be similar but not identical. Too much time is often spent in our courts comparing and distinguishing factual precedents. This was never meant to be the spirit nor the intent of our common law. Counsel should instead try to understand the legal, social or economic *raisons d'etre* underpinning a decision, assuming of course they exist. The search should be for principles. There should also be an understanding that what might be appropriate in the context of England, Australia or some other common law jurisdiction, may not always dovetail with the position in Singapore, notwithstanding our common legal heritage.

48. The search, to be even more precise, should be for principles applicable in today's context. I say this because principles that may have been apposite a century ago, or even a decade ago, may have to be viewed through the prism of time to assess their continuing relevance and applicability. The common law is not static. It evolves constantly in a measured manner. Counsel should also remember that such precedent itself must have had a beginning. They should not be inhibited by the lack of direct precedent if they can justifiably support their submissions by reference to other established and relevant principles together with the justness of their client's cause.

49. In these proceedings, I have been referred to a number of authorities on negligence, both civil and criminal, particularly by the Defence. I do not see any relevance, even penumbral, in a number of these authorities. While I appreciate that the intention of counsel was to assist the court, I feel the wood was lost for the trees somewhere along the way. The factual issues at hand are not complex though admittedly the issue (s) pertaining to the breach (es) of the Highway Code did require some serious consideration.

(emphasis added)

[32] As the element of victims' employability was fuzzy, it is apparent from the uncontroverted testimony of the dependent plaintiffs that the victims had provided and contributed monies for them. Section 114 EA comes to their aid, which provides for discretion of the court to invoke presumptions that are general in nature. The section renders the following:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, **human conduct**, and public and private business, in relation to the facts of the particular case. (emphasis added)

Provision and contribution of monies by the victims to their parents, respectively first and second plaintiff, strongly indicate they were in fact earning. In relation to the testimony of first and second plaintiffs, there were in fact contribution by the victims from their earnings to their families and both the first and second plaintiffs are dependants of their gainful employment and activity. Hence, in all probability, the plaintiffs were telling

A the truth about the monies earned by the victims and how it was spent. They are simple folks and the way monies were spent fits into a rural family set-up. Moreover, contribution of monies by children to the family is very much expected in such family units.

B **[33]** Insistence by counsel for defendant that the court has to be objective and not have a sympathetic stance is perhaps a one-dimensional view of the situation. Yes, the rule of law is supreme but its interpretation sometimes has to be tampered and situated in context, accounting for sociocultural settings. Allowing such a claim would also fall within inherent jurisdiction of this court. This is demonstrated in the case of *The Motor Emporium v. Arumugam* C [1933] 1 LNS 106, wherein Terrel Ag CJ had this to say:

> The court has the widest possible jurisdiction in all suits, matters and questions of a civil nature and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties and D apply such principles as are necessary or desirable for attaining such object and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

[34] In that context and flowing from the above, years of purchase for those who died before thirty years old pursuant to Act 67 is 16 years of purchase. E Therefore, compensation for the first victim would be RM500 x 16 years, which comes up to RM96,000. Funeral expenses of RM3,000 is also allowed. As for the second victim, premised on liability *vis a vis* defendant and the first victim, sum awarded would be RM600 x 16 years, adding up to RM115,200. Funeral expenses of RM3,000 is allowed too.

F *Claim For Bereavement And Funeral Expenses*

[35] On the claim for bereavement, counsel for defendant had relied on s. 7(3B) of Act 67. The basis being as the victims were already above eighteen years old at the time of accident, they have attained the age of majority, thus disentitled to the bereavement claim. Counsel for plaintiffs, *albeit* G acknowledging the effect of the provision in Act 67, submits feebly that there is a lacuna in the law. The law is applicable is as legislated by the Legislature and since it has not been amended, it applies squarely to the present case.

[36] On funeral expenses incurred, counsel for defendant stated there were no receipts and bills for the expenditure, thus there was no proof of such H expenses. The plaintiffs countered this by submitting as Muslims, the funeral expenditure would come under *khairat* which did not require proof of expenditure. However, judicial notice could be taken of such expenses which is necessarily incurred with the passing on of both the victims, pursuant to s. 56 EA. It was decided by the Federal Court in the case of *Pang Ah Chee* I *(M.W.) v. Chong Kwee Sang* [1985] 2 CLJ 221; [1985] CLJ (Rep) 236; [1985] 1 MLJ 153, that under s. 56 EA, the court may also take judicial notice of

matters which are of common and general knowledge. This would include situation in the present case that both victims who are Muslims had passed on due to the accident and definitely there would have been a Muslim funeral for which their respective families, with the first and second plaintiffs as dependants, incurred expenses to bear the funeral expenses. The claim for funeral expenses is thus allowed pursuant to s. 7(3)(ii) of Act 67.

Appellate Intervention

[37] This court when exercising its civil appellate jurisdiction, is in a permanent disadvantage to interfere with the findings of fact made by the SCJ in the case. This is simply because he had the advantage of having heard the audible evidence of witnesses. Hence, this court is not in a position to substitute conclusions reached by him premised on the body of evidence available unless it is perverse and discord with weight of evidence available. Likewise, this court too cannot substitute its own view on probabilities of case based on its own comparison and criticism of witnesses who had testified during the trial. (Reference made to *dicta* of Lord Sumner of the House of Lords in the case of *SS Hontestroom v. SS Sagaporack* (1927) AC 37).

[38] However, after having perused the record of appeal, I find that the SCJ had palpably missed the advantage of appreciating judicially the audible and documentary evidence proffered in the case. Thus appellate intervention is justified for the following glaring reasons:

(i) There has been insufficient judicial appreciation of the evidence as to the circumstances in which the accident had taken place.

(ii) The findings made by the SCJ is lop-sided, as he chose to only accord preponderance to evidence of the defendant who was able to testify as to how the accident had taken place. It is most unfortunate that the victims of the accident, the children of the first and second dependant plaintiffs are deceased, thus their testimony is absent. The SCJ ought to have been more mindful as to how the accident may have happened and foremost in his mind has to be the probabilities of the case by which the accident could have taken place. In order to do so, he has to view altogether the evidence of the defendant, the IO of case as well as the damage which had been caused to the motorcar driven by the defendant, the *locus in quo* where the accident took place (in the present case it was uphill and downhill) and extensive damage caused to the motorcycle ridden by the first victim, which was a total wreckage. What matters is the confluence of all these factors, and not testimony of the defendant alone.

(iii) The fact that the defendant was unable to see the motorcycle approaching until it came so close to her is in fact a deciding factor demonstrating that on a balance of probabilities, the defendant would

A have in fact been unable to have avoided the accident. Considering the circumstance, it is only logical to conclude that the motorcyclist (first victim) may not have been speeding as it is impossible for a motorcycle of that make which was ferrying a pillion rider to have been ridden fast at the material time.

B (iv) All these factors were not accorded ample consideration it deserves by the SCJ before arriving at a finding of fact on the manner by which the accident had taken place and who is blameworthy appropriately.

(v) He had adopted a mere straight jacket approach by considering only the testimony of defendant as well as IO, who came on to the scene of C accident after it had taken place. His testimony point towards a possible "re-enact" or "re-construct" of the accident according to his own judgment. He is not a witness of fact pursuant to s. 60(1) EA, hence the trial judge ought to have been more vigilant when receiving and considering his evidence.

D

(vi) The SCJ was in a haste to conclude that both dependants of the victims who are plaintiffs to the civil action were lying on the gainful employment and activity of the victims and income earned by them. He took the stand to go along with the case theory of the defendant that there E was an attempt by the plaintiffs to shore and spruce up their case in order for the court to award damages for loss of dependency. The basis for doing so could be because the SCJ chose to believe the witnesses for the defendant but not the plaintiffs. Why is it so? There is no analysis on the basis or reason for doing so. In that regard, the SCJ had improperly rejected the evidence of the plaintiffs proffered *vide* documentary proof. F Pursuant to s. 167 EA, if the rejected evidence is received, appellate intervention is well justified, as has happened in the present case. Testimony by witnesses be it from the plaintiff or defendant has to be accorded its due weight pursuant to s. 136(1) EA as it is relevant and admissible pursuant to the Evidence Act and in accord with the burden G of proof each party bears in order to prove their case pursuant to ss. 101 and 102 EA and obtain judgment in their favour. Moreover, it is bounden duty of a trial judge to arrive at a decision on a balance of probabilities. For him to be overly skewed towards the case of the defendant is unjustifiable in the circumstance of the case.

H (vii) The trial judge ought to have been mindful that it would be great ingenuity on the part of the plaintiffs to spruce up their case by creating or fabricating evidence on proof of gainful employment of the victims of the accident. The number is not one or two but many. Why should they, when it is true that the first victim was in fact working at Chandra I Agro and the second victim at Tazzuwa Enterprise. Their parents who

are simple folks and dependants who had appeared in court, taken oath and withstood cross-examination to testify that their children (the victims) were in fact working before the accident and they were able to bring back monies to home to contribute towards food on the table and other sundry expenses which the dependants are dependent on. In fact, the trial judge ought to have raised his eyebrows when witnesses like SD1 and SD3 were trolling to rebut the plaintiffs' case at all cause with the ultimate purpose of thwarting the claim by plaintiffs as dependents, which is justifiable under the law.

[39] In view of the foregoing, the eventual upshot is the decision by the SCJ is reversed and the plaintiffs' claim against the defendant is allowed. The counterclaim and set-off by the defendant is also allowed. Liability is apportioned at 50/50 and award of quantum of damages due to the first plaintiff is of course subject to the liability apportioned. Interest on the claim for damages is allowed together with costs of RM3,000.

Claim by both plaintiffs allowed. Liability apportioned on 50/50 percentage basis.